

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of)
)
NORCOM COMMUNICATIONS)
CORPORATION)
)
 Business Radio Station License WNQF836)
 SMR Radio Stations WZA770, WNBW505,)
 WNAJ380, WNRU218 and WNJU965)
 New York, New York/Long Island Area)
)
 Application to Modify Business)
 Radio Station License WNQF836)
 New York, New York/Long Island Area)
)
 Application to Modify SMR)
 Radio Station License WZA770)
 New York, New York/Long Island Area)
)
 Application to Modify SMR)
 Radio Station License WNBW505)
 New York, New York/Long Island Area)
)
ASSOCIATION FOR EAST END)
LAND MOBILE COVERAGE)
 Business Radio Station License WPAT918)
 New York, New York/Long Island Area)
)
LMR 900 ASSOCIATION OF SUFFOLK)
 Business Radio Station License WNXT323)
 New York, New York/Long Island Area)
)
METRO NY LMR ASSOCIATION)
 Business Radio Station License WPAZ643)
 New York, New York Area)
)
NY LMR ASSOCIATION)
 Business Radio Station License WPAP734)
 New York, New York/Long Island Area)
)
WIRELESS COMMUNICATIONS)
ASSOCIATION OF SUFFOLK COUNTY)
 Business Radio Station License WPAT910)
 New York, New York/Long Island Area)

WTB DOCKET NO. 98-181

File Number A008053

File Number C002479

File Number C002480

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To: Administrative Law Judge John M. Frysiak

WIRELESS TELECOMMUNICATIONS BUREAU'S COMMENTS ON JOINT MOTION FOR
PERMISSION TO APPEAL

The Chief, Wireless Telecommunications Bureau ("Bureau"), by his attorneys, and pursuant to the Presiding Judge's *Order*, FCC 99M-10 (released February 12, 1999), hereby files comments upon the "Joint Motion for Permission to Appeal" filed by Metro NY LMR Association ("Metro"), licensee of Business Radio Station WPAZ643, and Wireless Communications Association of Suffolk ("Suffolk"), licensee of Business Radio Station WPAT910, on February 5, 1999.

1. In his Memorandum Opinion and Order FCC 99M-8, (released February 4, 1999), the Presiding Judge found that "until [Suffolk and Metro] surrender their respective licenses they are parties to the revocation proceeding designated against them. Being parties in this proceeding, they must respond as the Commission's Rules require." In their "Joint Motion for Permission to Appeal," Suffolk and Metro seek the Presiding Judge's permission to appeal that ruling to the Commission.¹

2. The Joint Motion should be denied because they have not met the standard for obtaining an interlocutory appeal of the Presiding Judge's ruling. Section 1.301(b) of the Commission's Rules provides that a request for leave to appeal an interlocutory order must show "that the appeal **presents a new or novel question of law or policy** and that the ruling is such that error would be **likely to require remand** should the appeal be deferred and raised as an exception." (Emphasis added). Neither circumstance is present here. The Presiding Judge's authority to regulate the course of the hearing and to control the entry and dismissal of parties is

¹ The Bureau's comments were originally due on February 22, 1999. However, because the Bureau did not timely receive a copy of the Order, the response time was orally extended by the Presiding Judge until March 15, 1999.

well established, and even if the Presiding Judge's ruling is erroneous, Suffolk and Metro have failed to show how that error could result in a remand of the proceeding.

3. Suffolk and Metro claim that they have the "absolute right" to waive the right to a hearing and to withdraw from this proceeding. This is not correct. Section 1.92(a) of the Commission's rules specifies three circumstances which constitute waivers of the right to a hearing:

- (1) The respondent fails to file a timely written appearance as prescribed in Section 1.91(c) indicating that he will appear at a hearing and present evidence on the matters specified in the order.
- (2) The respondent, having filed a timely written appearance as prescribed in Section 1.91(c), fails in fact to appear in person or by his attorney at the time and place of the duly scheduled hearing.
- (3) The respondent files with the Commission, within the time specified for a written appearance in Section 1.91(c), a written statement expressly waiving his rights to a hearing.

None of these circumstances is present here. Indeed, Suffolk and Metro subjected themselves to the Presiding Judge's jurisdiction by filing timely notices of their intent to appear at the hearing. Since they voluntarily subjected themselves to the Presiding Judge's jurisdiction, they cannot be heard to complain that the Presiding Judge must approve their request to withdraw from the hearing proceeding.

4. It is also instructive to consider Section 73.3523(c) of the Commission's Rules, 47 C.F.R. § 73.3523(c):

If a competing applicant seeks to dismiss or withdraw its application after the Initial Decision stage of the hearing on its application, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of the any written agreement related to the dismissal or withdrawal, and an affidavit setting forth . . .

Although this section is not directly applicable to the case at hand, it does show that parties do not have any "absolute" right to withdraw from a proceeding without the approval of the Presiding Judge or the Commission.

3. Whether parties who requested a hearing may withdraw at this stage of the proceeding is clearly within the discretion of the Presiding Judge. Prior to the surrender of Suffolk's and Metro's licenses for immediate cancellation, the Presiding Judge properly exercised his discretion by prohibiting Suffolk and Metro from withdrawing and simultaneously retaining their licenses. Now that Suffolk and Metro have surrendered their licenses for "immediate cancellation," the Bureau believes that the Presiding Judge should exercise his discretion to permit them to withdraw from this proceeding.

4. Suffolk and Metro should not be given permission to appeal the Presiding Judge's February 4 *Memorandum Opinion and Order* because the ruling was correct given the circumstances existing at the time it was made. Now that circumstances have changed, the Bureau believes that Suffolk and Metro should be permitted to withdraw. If Suffolk and Metro are permitted to withdraw at this time, their Motion for Permission to Appeal will be moot.²

² If Suffolk and Metro are permitted to withdraw, this would not resolve the monetary forfeitures proposed against them. The appropriate procedure for resolving the forfeitures would be for the Presiding Judge to certify those matters to the Commission for administrative disposition pursuant to Section 1.92(c) the Commission's Rules, 47 C.F.R. §1.92(c).

5. Accordingly, the Bureau asks the Presiding Judge to deny Suffolk's and Metro's "Joint Motion for Permission to Appeal."

Respectfully Submitted,
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March 15, 1999

Certificate of Service

I, Arlene Cook, an Intern employed by the Enforcement and Consumer Information Division of the Wireless Telecommunications Bureau, certify that, on March 15, 1999, a copy of the foregoing "Wireless Telecommunications Bureau's Comments on Joint Motion for Permission to Appeal," was sent by facsimile and first class mail to:

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and was hand-carried to:

Honorable John M. Frysiak
Administrative Law Judge
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Washington, D.C. 20554


Arlene Cook